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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 399

NEW ORLEANS INSURANCE EXCHANGE,
Appellant

vs.

UNITED STATES OF AMERICA,
Appellee

On Appeal from the United States District Court for the Eastern Division of Louisiana, New Orleans Division

AMICUS CURIAE BRIEF ON BEHALF OF THE STATE OF TEXAS

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AMICUS CURIAE BRIEF ON BEHALF OF THE STATE OF TEXAS

To The Honorable Supreme Court of The United States:

The State of Texas, acting by and through Will Wilson, its Attorney General, respectfully submits its brief as amicus curiae upon the question as to whether the taxation and regulation of the business of insurance is subject to State control where a state,

such as Texas, has acted in accordance with the authority delegated to it by the Congress in the McCarran-Ferguson Act, 15 U.S.C. 1011-1015.

The State of Texas is gravely concerned as to whether its State Board of Insurance and Commissioner of Insurance may regulate the insurance business of Texas in accordance with the comprehensive Insurance Code of Texas, guided by the opinions of the Attorney General of Texas interpreting its provisions, or whether such regulation may be continued without interference by the Federal Government only if conducted in accordance with the views of the Antitrust Division of the Department of Justice. Texas has anti-trust laws as comprehensive as those of the Federal Government.[1] The Attorney General of Texas and the District and County Attorneys of Texas are charged with the enforcement of its anti-trust laws[2] and all citizens of the State have recourse to such laws for actual and exemplary damages for injury resulting from any violation of the anti-trust laws of Texas.[3]

There now exists an uncertainty as to whether the decision in *Miley v. John Hancock Mutual Life In-*

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[1] The anti-trust laws of Texas, both civil and criminal, are set forth verbatim in the Appendix to this brief.

[2] The Attorney General of Texas has vigorously prosecuted violations of the anti-trust laws. A few examples are: *State v. Standard Oil Co.* 130 Tex. 313, 107 S.W. 2d 550 (Sup. Ct. 1937); *Ford Motor Co. v. State*. 142 Tex. 5, 175 S.W. 2d 230 (Sup. Ct. 1943); *Arkansas Fuel Oil Co. et al v. State*, 154 Tex. 573, 280 S.W. 2d 723 (Sup. Ct. 1955); *State v. Swift and Co.*, 187 S.W. 2d 127 (Civ. App., error refused 1945).

[3] *Cline v. Insurance Exchange of Houston*, 140 Tex. 175, 166 S.W. 2d 677 (Sup. Ct. 1943).

surance Co., et al., 148 F. Supp. 299, aff. 242 F. 2d 758, cert. den. October 14, 1957, correctly declares the law in holding that in view of the McCarren-Ferguson Act, Federal regulation is precluded in States which, like Texas, have comprehensive and complete laws regulating the insurance business, together with anti-trust laws with sweeping prohibitions against agreements or combinations in restraint of trade.

The State Board of Insurance of Texas determines and fixes proper rates of premiums which must be adhered to in insuring motor vehicles and workmen's compensation insurance risks. If insurance companies and agents fail to adhere to such fixed rates they are in violation of State law. Insurance companies may enforce rates with respect to fire and allied lines and surety bonds only when such rates have been duly filed with and approved by the Board. In addition, policy contracts for fire and allied lines, workmen's compensation insurance, motor vehicle and surety bonds must be written on the policy contract forms prescribed by the Board. Even in the field of health and accident insurance there are numerous compulsory provisions which must be inserted in each policy contract.

The State of Texas is submitting, in connection with this brief, copies of the Texas Insurance Code (1957 Ed.) which is published by the State Board of Insurance. This Honorable Court will note that the printed Code is a book containing 444 pages of laws applicable to the business of insurance, exclusive of the anti-trust laws. For ready reference a list of

some of the articles pertaining to rate and policy form control are shown below.[4]

Articles 1.04 (b) (c) and 1.10 set forth the duties of the State Board of Insurance and the Commissioner of Insurance. A casual reading of these articles discloses that the Board and the Commissioner have sweeping control of insurance companies as to whether they should be permitted to transact business within the State of Texas, including the right to suspend the entire business of any company within the State which is found to be in ". . . non-compliance with any provision of the laws relative to insurance . . ." The Board and the Commissioner have not only very broad power in the control of rates and policy forms but also like control in determing whether insurance companies have proper reserves, impairment of surplus, etc. In addition, the Board and the Commissioner are required to report to the Attorney General of the State any violations of law which may be discovered in the exercise of the comprehensive control of the insurance business.

Articles 2.01, et seq., give the Board and the Commissioner exclusive control over the incorporation of insurance companies, including the determination as

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[4] Art. 5.01. Board required to fix motor vehicle rates (p. 95); Art. 5.06. Board required to prescribe Motor vehicle policy forms. Approval by endorsements required. (p. 97). Art. 5.15. Fidelity, Guaranty and Surety bond rates must have Board approval based on factors specified by law. (p. 100) Arts. 5.25 and 5.26. Maximum rates fixed for fire insurance with deviation below fixed rates under certain conditions. (p. 105). Art 5.35. Board prescribes uniform fire policies which all companies must use. (p. 110). Art. 5.55. Workmen's compensation rates fixed by Board. (p. 119). Art. 5.56. All companies required to use uniform policy forms prescribed by Board. (p. 120).

to whether such companies are properly qualified to continue in business, how dividends shall be paid, and all other matters in the conduct of their business. Likewise, foreign or out-of-state companies must obtain permits to do business in Texas and subject themselves to the same requirements as domestic companies, which includes control as to reserves, investments, and ownership of real estate. Articles 5.68, et seq., set forth the provisions of the Penal Code of Texas which pertain only to insurance business. It will be noted that penalties are provided for any failure to obey the insurance laws and regulations issued by the Board and the Commissioner. The penal provisions are in addition to the anti-trust laws of Texas noted above.

There now exists a great uncertainty and confusion as to whether the Board of Insurance and the Commissioner of Insurance, together with the Attorney General of Texas, may determine finally whether the insurance business is being properly transacted in the State of Texas, and whether the insurance laws of Texas and regulations promulgated pursuant thereto can be enforced in accordance with the interpretation of such laws by the Board and Commissioner and the Attorney General of Texas without interference by the Antitrust Division of the Department of Justice.

The McCarran-Ferguson Act undoubtedly was the result of congressional effort to return to the states the regulation and taxation of the insurance business (provided they had comprehensive, adequate statutory regulation) as a result of *United State v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944). The affirmance of *Miley v.*

John Hancock Mutual Life Insurance Co., 148 F. Supp. 299, aff. 242 F. 2d 758, cert. den. October 14, 1957, apparently declared the law to be that states which, like Massachusetts and Texas, had comprehensive insurance regulation, would be premitted to enforce their laws without interference from the Department of Justice. However, affirmance of the *New Orleans Insurance Exchange* case, 148 F. Supp. 915, seems to be squarely in conflict with the views expressed in the *Miley* case.

The State of Texas is now confronted with this realistic problem. The State Board of Insurance fixes rates with respect to certain lines of insurance and different rates may be applied to certain other lines only after approval by the Board. The Attorney General of Texas will prosecute vigorously any company which fails or refuses to comply with the rates provided by law. The question is: After the State of Texas, through its State Board of Insurance and the Attorney General, enforces rates and other regulations of the insurance business, will those who comply with such compulsory regulation be prosecuted by the Antitrust Division of the Department of Justice as in the *South-Eastern* case?

The State of Texas, through its Attorneys General, has for many years enforced the provisions of its anti-trust laws in the case of insurance companies. At the time of the enactment of the anti-trust laws in 1889 the business of insurance was not specifically named in the statutory provisions. In 1893 the Supreme Court of Texas, in *Queen Insurance Company v. State ex rel Attorney General*, 86 Tex. 250, 24 S.W. 397, so held, and in 1903 amendatory legislation provided for prosecution of anti-trust violations by in-

surance companies. *Griffin v. Palatine Insurance Co.*, 238 S.W. 637 (Comm. App. 1922).[4]

Although the laws of Texas provide specifically for prosecution in the case of boycotts (Art. 7428, Vernon's Civil Statutes, and Art. 1634, Vernon's Penal Statutes), would a successful prosecution of a violator of either or both of these statutes preclude similar action against the offender by the Department of Justice? We think not.

The State of Texas has endeavored to enact comprehensive laws for the regulation of the insurance business. In view of the decisions in *Crafts v. Federal Trade Commission*, 244 F. 2d 882 (1957) and *American Hospital and Life Insurance Co. v. Federal Trade Commission*, 243 F. 2d 719 (1957) by the Courts of Appeal for the 9th and 5th Circuits, respectively, the 55th Legislature of Texas in 1957 enacted a broad and comprehensive statute governing unfair competition and unfair practices set forth as Article 21.21 of the Texas Insurance Code at pages 285-289 of the Code. Section 1 of the Act declares that the purpose of the Act is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the McCarran-Ferguson Act. The State of Texas, through its Attorney General, will vigorously prosecute all violations of this statutory provision which are brought to his attention.

Therefore, the State of Texas respectfully requests this Honorable Court to grant a rehearing in the *New Orleans Insurance Exchange* case and declare

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[4] For prosecution of insurance companies under the anti-trust laws, see *Potomac Fire Insurance Co. v. State*, 18 S.W. 2d 929 (Civ. App. 1929, error refused).

the law as to whether the McCarran-Ferguson Act restores to the State the right to enforce, free from Federal interference, their laws which afford complete regulation of the insurance business. The State of Texas respectfully suggests that, if those who observe and conform to State regulation are subject to prosecution for violation of Federal anti-trust laws, in the event the Anti-trust Division of the Department of Justice does not agree with the interpretation and enforcement of State law, the Attorneys General and regulatory agencies of the State concerned with enforcement should know it. The State Board of Insurance of Texas and the Attorney General of Texas should know whether their interpretation and enforcement of State law may be accepted by the insurance business with safety, or whether they should enforce only such compulsory regulation as will meet with the approval of the Anti-trust Division. The State of Texas should not be in a position of enforcing compliance with its regulations, and then find that such compliance is rewarded by prosecution for violation of Federal law.

The State of Texas submits that the question of law discussed in this amicus curiae brief is, of itself, so grave and substantial as to justify its consideration by this Court on its merits.

Respectfully submitted,

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APPENDIX

The following articles are statutory provisions contained in Title 126 (Trusts-Conspiracies Against Trade) contained in Vernon's Texas Statutes (1948 Ed. Vol. 1).

"Article 7426. 7796 'Trusts'

"A 'trust' is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any or all of the following purposes:

"1. To create, or which may tend to create, or carry out restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by laws of this State.

"2. To fix, maintain, increase or reduce the price of merchandise, produce or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

"3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or *the business of insurance*, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation.

"4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or

the cost of transportation, or *insurance*, or the preparation of any product for market or transportion, shall be in any manner affected, controlled or established.

"5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or *to make any contract of insurance* at a price below a common standard or figure or by which they shall agree in any manner to keep the price of such article or commodity or *charge for* transportation or *insurance*, or the cost of the preparation of any product for market or transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or *the cost of* transportation or *insurance*, or the cost of the preparation of any product for market or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or *business of* transportation or *insurance*, or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity, or charge for transportation or *insurance* or charge for the preparation of any product for market or transportation whereby its price or such charge might be in any manner affected.

"6. To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or *the amount*

of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation.

"7. To abstain from engaging in or continuing business, or from the purchase or sale of merchandise, produce or commodities partially or entirely within the State of Texas, or any portion thereof." (p. 2081)

"Art. 7427. 7797 'Monopoly' defined

"A monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods:

"1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first article of this chapter.

"2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise." (p. 2082)

"Art. 7428. 7798 Conspiracies against trade

"Either or any of the following acts shall constitute a conspiracy in restraint of trade:

"1. Where any two or more persons, firms, corporations or associations of persons, who are

engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or undertaking to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity.

"2. Where any two or more persons, firms, corporations or associations of persons, shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association or persons for buying from or selling to any other person, firm, corporation or association of persons.

"3. Where any two or more persons, firms, corporations or associations of persons shall agree to boycott, or enter into any agreement or understanding to refuse to transport, deliver, receive, accept, erect, assemble, operate, use or work with any goods, wares, merchandise, articles or products of any other person, firm, corporation or association of persons; provided, however, that this sub-division of this Article shall not be construed to apply to an agreement between employees to terminate their employment, or to refuse to transport, deliver, receive, accept, erect, assemble, operate use or work with the goods wares, merchandise, articles or products of their immediate employer unless such refusal is intended or calculated to induce, or shall have the effect of inducing, such employer to refrain from purchasing or from otherwise acquiring goods, wares, merchandise, articles or products from any person, firm, corporation or association of persons." (p. 2083)

The following articles are statutory provisions contained in Title 19 (Trusts and Conspiracies), Vernon's Texas Statutes (1948 Ed. Vol. 2). Article 1632 defining "Trusts" is identical in language with Article 7426, Vernon's Texas Civil Statutes, *supra*. Article 1633 defining "Monopoly" is identical with Article 7427, Vernon's Texas Civil Statutes, *supra*, and Article 1634, Vernon's Penal Code, defining "Conspiracy in restraint of trade" is identical with Article 7428, Vernon's Texas Civil Statutes.

"Art. 1635. [1466] Punishment

"Whoever violates any provision of this chapter shall be confined in the penitentiary not less than two nor more than ten years." (p. 340)

"Art. 1637. [1470] Agreement to form trust, monopoly, etc.

"If any person shall enter into an agreement or understanding of any character to form a trust, or to form a monopoly, or to form a conspiracy in restraint of trade, as these offenses are defined to this chapter or shall form a trust, monopoly or conspiracy in restraint of trade, or shall be a party to the formation of a trust or monopoly or conspiracy in restraint of trade, or shall become a party to a trust or monopoly or conspiracy in restraint of trade, or shall do any act in furtherance of aid to such trust or monopoly or conspiracy in restraint of trade, he shall be confined in the penitentiary not less than two nor more than ten years." (p. 340).

"Art. 1638. [1471] Operating in violation of this law

"If any person, shall, as a member, agent, employe, officer, director or stockholder of any business, firm, corporation or association of persons, form, in violation of the provisions of this chapter, or shall operate, in violation of such provisions, any such business, firm corporation or association formed in violation of this chapter, or shall make any sale, or purchase, or any other contract, or do business for such business, firm, corporation or association, or shall do any other act which has the effect of violating or aiding in the violation of any provision of this chapter, or shall, with the intent or purpose of driving out competition or for the purpose of financially injuring competitors, sell within this State at less than cost of manufacture or production, or sell in such a way or give away within this State, products for the purpose of driving out competition or financially injuring competitors engaged in a similar business, or give secrete rebates on such purchase for the purpose of the aforesaid, he shall be confined in the penitentiary not less than two nor more than ten years." (p. 340)

"Art. 1639 [1472] Persons outside State liable

"If any person, shall, outside of this State, do anything which, if done within this State, would constitute the formation of a trust or monopoly or conspiracy in the restraint of trade, as defined in this chapter, and shall cause or permit the trust or monopoly so formed by him to do business within this State, or shall cause or permit such trust, monopoly, or conspiracy in restraint of trade to have any operation or effect

within this State, or, if such trust, monopoly or conspiracy in restraint of trade, having been formed outside of said State, any person shall give effect to such trust, monopoly or conspiracy in this State, or he shall do anything to help or aid it doing business in this State, or otherwise violate the anti-trust laws of this State, or if any person shall buy or sell or otherwise make contracts for or aid any business, firm, corporation or association of persons, formed or operated in violation of any provision of this chapter, or so formed or operated as would be in violation of the laws of this State, if it had been formed within this State, shall be confined in the penitentiary not less than two nor more than ten years." (p. 340)

"Art. 1640. [1473] Forming trusts, etc.

"If any person, employe, agent, stockholder, or officer of any person, firm, association of persons, or corporation, now doing business in this State, have formed a trust, or monopoly, as defined in this chapter, or have formed a conspiracy in restraint of trade, as defined in this chapter, or shall do or perfor many act of any character to carry out such trust, monopoly or conspiracy in restraint of trade, such person, employe, agent, stockholder, or officer, shall be confined in the penitentiary not less than two nor more than ten years." (p. 341)